Pace University
DigitalCommons@Pace

Faculty Working Papers | Lubin School of Business

12-1-1998

Assessing NAFTA - Part III: NAFTA and the Environment

Julie A. Soloway
University of Toronto

Follow this and additional works at: http://digitalcommons.pace.edu/lubinfaculty_workingpapers

Recommended Citation
Soloway, Julie A., "Assessing NAFTA - Part III: NAFTA and the Environment" (1998). *Faculty Working Papers.* Paper 35.
http://digitalcommons.pace.edu/lubinfaculty_workingpapers/35

This Article is brought to you for free and open access by the Lubin School of Business at DigitalCommons@Pace. It has been accepted for inclusion in Faculty Working Papers by an authorized administrator of DigitalCommons@Pace. For more information, please contact rracelis@pace.edu.

WORKING PAPERS

No. 179 December 1998

Assessing NAFTA - Part III

NAFTA and the Environment

by

Julie A. Soloway, LL.M.
Fellow and Research Coordinator for the NAFTA Environmental Regulation and Canadian Competitiveness Project at the Center for International Studies of the University of Toronto

ASSESSING NAFTA - PART III

NAFTA AND THE ENVIRONMENT

by

Julie A. Soloway, LL.M.

Julie A. Soloway is a Fellow and Research Coordinator for the NAFTA Environmental Regulation and Canadian Competitiveness Project at the Center for International Studies of the University of Toronto.

PREFACE

This paper is one of three Lubin Working Papers on "ASSESSING NAFTA." These papers are part of a wider project to assess the impact of NAFTA, which was carried out in the fall and winter of 1997-98, for the Institute of International Trade and Investment in Japan.

Opinion about NAFTA in the U.S. is deeply divided. Critiques of NAFTA, particularly in the U.S., reflect a reaction to excessive claims made earlier by NAFTA proponents. More importantly, however, they reflect a growing anxiety about the economic and social impact of trade on Americans — on their jobs, income, employment, and labor standards, for example. Many Americans wonder if trade is responsible for stagnating wages, the decline of U.S. workers employed in manufacturing, and rising levels of income inequality in American society. NAFTA has become a code-word for a host of fearful and contentious issues that have little to do with the agreement, including globalization, economic dislocation, job insecurity, ethnic paranoia, and even the future of the American middle class.

In these papers we identify and assess recent research on the effect of NAFTA on trade, investment, jobs, income, and the environment. Our review led to these conclusions:

- NAFTA is an important agreement and, together with the Uruguay Round accord, will exert substantial influence over patterns of trade and investment in the future.

- However, to date, NAFTA has had only a modest direct impact on patterns of trade and investment in North America. The same holds true for employment and wages. The NAFTA side agreements have led to some change in environmental protection policy and in the protection and enhancement of labor rights. These results are also modest, and it is simply too early to evaluate the impact of the agreement on these areas.

- NAFTA, in our view, should be seen not as the beginning of the process of economic integration in North America, but as a response to powerful forces of change that began in the mid-1980s. These include changes in policy — particularly when the collapse of oil prices forced the Mexican and Canadian governments to abandon import-substitution economic development strategies and changes in markets — as rising levels of international competition forced firms to reduce excess capacity and to rationalize operations in North America.

- Changes in corporate structure and organization have been a more powerful force in driving the restructuring of the North American economy than NAFTA itself.

- NAFTA's greatest value has been its impact on government and business policies and decisions; factors that cannot be measured in economic terms. Most remarkable was Mexico's ability to maintain its commitment to trade liberalization during the peso crisis of December 1994 by reversing its traditional policy of closing markets by imposing import restrictions.

One finding is both clear and ominous. Whereas four years ago, the United States took the leadership role in pressing for the implementation of a North American free trade agreement, today support for the agreement and for the expansion of NAFTA is stronger in Canada and Mexico (even after the peso crisis) than in the United States.

INTRODUCTION

Environmental issues were of prime concern in the debate leading up to the passage of NAFTA, partly resulting from the fear that Mexico had considerably less stringent environmental enforcement than Canada and the United States. The environmental concerns about NAFTA revolved around three main issues. First, Mexican firms would gain an "unfair" competitive advantage vis-a-vis Canadian and U.S. firms because of lower environmental compliance costs. Second, Canadian and U.S. firms would be drawn to Mexico to capitalize on reduced environmental compliance costs in order to remain competitive, that is, Mexico would become a "pollution haven." Third, Canadian and U.S. firms would lobby their governments to lower domestic environmental standards in order to "level the playing field."[1]

These concerns were translated into a number of novel provisions that took account of the inextricable link between trade and the environment. This paper evaluates the success of the environmental provisions of NAFTA in its first four years of existence. It first reviews the "green" provisions found directly and indirectly within the text of NAFTA and comments on how those provisions have been implemented, or have taken effect, over the past four years. The environmental side agreement to NAFTA is also evaluated. Its provisions are reviewed and considered in the context of its contribution to the conservation, protection, and enhancement of the North American environment. Finally, some conclusions about NAFTA's environmental impacts are discussed.

NAFTA'S ENVIRONMENTAL PROVISIONS

NAFTA has incorporated, throughout its text, environmental provisions that essentially can be separated into six categories: (i) the NAFTA preamble; (ii) NAFTA's relationship with international environmental agreements; (iii) standards-related measures; (iv) sanitary and phytosanitary measures; (v) the pollution haven investment provision; and (vi) the dispute resolution provisions.[2] This section will review each of these six categories and provide some insights into the extent to which they have been utilized since NAFTA's inception four years ago.

[1] Alan Rugman and Julie A. Soloway, "Corporate Strategy and NAFTA When Environmental Regulations Are Barriers to Trade," *Journal of Transnational Management Development* 3 (2), (forthcoming); J. O. Saunders, "NAFTA and the North American Agreement on Environmental Cooperation: A New Model for International Collaboration on Trade and the Environment," *Colorado Journal of International Environmental Law and Policy*, 5(2) (1994): pp. 273-304.

[2] Raymond B. Ludwiszewski and Peter E. Seley, "Reconciling Free Trade and Environmental Protection" in Rubin, Seymour J. and Dean C. Alexander (eds.), *NAFTA and the Environment* (The Hague: Kluwer Law International, 1996): pp. 1-24.

NAFTA Preamble

The preamble to NAFTA contains references to the environment. All three member countries agreed to implement measures to ensure a predictable and stable commercial framework as one of their goals. The preamble adds that these measures should be undertaken "in a manner consistent with environmental protection and conservation." It also includes parallel environmental commitments to the main trade-related commitments by adding as goals the "promotion of sustainable development" and the "strengthening of the development and enforcement of environmental laws and regulations" among the three parties. Although these provisions do not impose concrete or specific obligations on the parties, they are groundbreaking in that such extensive environmental language has not to date appeared in the text of a trade agreement.[3] The preamble further lays out some "guiding principles" in the interpretation of more specific environmental provisions within the text of NAFTA. Although the effect of these provisions is not readily measurable, they have helped to set the context in which the rules of the trading game are interpreted.

NAFTA's Relationship with International Environmental Agreements

The relationship between international trade agreements and international environmental agreements is contentious and remains unresolved at the level of the World Trade Organization (WTO). International environmental agreements often include trade sanctions for non-compliance, and the debate has centered around the legality of such agreements in international trade law. NAFTA has effectively solved this problem by stating that NAFTA will not interfere with trade provisions of four specific environmental/conservation agreements, including the Montreal Protocol on Ozone-Depleting Substances, or any other future agreed on measure. To date, the list of four "exempted" agreements has not been expanded. Whether the number of exempted agreements is increased over time will indicate the extent to which either environmental values or trade values will be given precedence in the emerging North American cooperative regime.

Sanitary and Phytosanitary Standards (SPS)

SPS measures are undertaken for the protection of human, animal, and plant life and health from disease, pests, and other dangers. SPS rules govern, for example, the types of pesticides that can be used on fresh fruit imported into a country or the inspection processes for imported meat products. Such issues, although seemingly benign, are often the subject of controversy. One country's allowable risk is another country's potential health disaster. As scientific risk assessments vary, parties often allege that such measures are misused for trade protection purposes.[4] NAFTA is explicit in maintaining each party's right to set the level of protection it deems most appropriate. It also contains a number of provisions that encourage the harmonization of standards without lowering the level of protection. The rules also provide a process that encourages parties to recognize other member's standards as equivalent. The

[3] Ludwiszewski and Seley, 1996.
[4] Rugman and Soloway (forthcoming).

complex technical issues dealt with in the SPS provisions provide a "fertile field for disputes among the NAFTA partners."[5]

The dispute settlement rules in this section are more environmentally sensitive than the classic rules, as found in the GATT. In the event that an environmental health or safety measure is challenged as an unfair restriction on trade, under NAFTA, the burden of proving that the challenged regulation is illegal rests with the party alleging the provision encumbers trade. Under GATT, that burden rests with the party defending the SPS measure. The result of this seemingly technical legal provision is that it is relatively difficult under NAFTA to successfully challenge an environmental regulation on the basis that it unduly restricts trade.

The SPS provisions were implemented partially in response to the "downward harmonization" concerns associated with NAFTA. Ideally, they foster upward convergence of environmental protection, while at the same time preserving each party's sovereignty by allowing them to adopt the level of protection that best suits the needs of another party's local conditions and concerns. Whether this has been done in practice is more difficult to evaluate. There have be no formal disputes under NAFTA regarding SPS measures. There was one dispute settlement panel under the FTA concerning SPS standards. In this dispute, the Canadian government challenged a Puerto Rican regulation banning the import of ultra-high temperature (UHT) processed milk from Quebec with partial success. Certainly, efforts at harmonization and equivalence have been instituted as part of an ongoing process among the intergovernmental committees that regularly meet to review and discuss these issues (see Section III on NAFTA's environmentally-related institutions). Such institutional arrangements have generally been successful in securing market access among the parties and have helped foster higher standards in Mexico through education and technology assistance.[6] However, trade issues remain especially problematic in the area of agriculture, as the SPS provisions are allegedly used more to protect domestic commercial interests than consumer health interests. For example, there are over 30 plant and animal health issues outstanding between the United States and Mexico that severely impede trade, resulting in harmful impacts on commercial agricultural interests. There is further evidence that in many cases domestic interests have "captured" the process by which these regulations are made, and the parties have resisted reaching any sort of resolution of certain SPS issues in order to benefit their constituencies from decreased competition.[7] This violates both the spirit and intent of the drafters of NAFTA: The preservation of the right to set environmental standards as a party sees fit in order to avoid a "race to the bottom" has become a tool by which parties promote protectionist policies.

[5] Ludwiszewski and Seley, 1996.
[6] Commission for Environmental Cooperation, *NAFTA's Institutions: The Environmental Potential and Performance of the NAFTA Free Trade Commission and Related Bodies,* Environment and Trade Series 5 (Montreal, 1997).
[7] Rugman and Soloway (forthcoming).

Standards-Related Measures (SRM)

Standards-related measures, also referred to as "technical standards," function in much the same way as the SPS measures. SRMs cover all human health, safety, and environmental standards not covered by the SPS rules. These rules were developed concurrently with the WTO Technical Barriers to Trade Agreement during the Uruguay Round and are consequently quite similar. They seek to provide a framework by which technical standards that unduly restrict trade can be separated from those that serve legitimate consumer interests. Like the SPS rules, the SRM provisions preserve the freedom of the parties to set environmental standards as they see fit, while at the same time encourage upward harmonization to the extent possible. Adherence to international standards, such as those set by the International Standards Organization in Geneva, is also encouraged. The SRM provisions appear to favor enforcement of environmental measures over the principle of encumbered trade even if these measures may have a trade-restricting impact.

There have been no dispute settlement panels to date that have considered a challenge to a technical measure that creates an undue restriction on trade. However, many SRM concerns have been the subject of dispute settlements by the WTO since its inception in 1995 and have remained a problematic issue on the international trade agenda. There is an extensive intergovernmental institutional framework supporting the work done in the area of SRMs (see Section III on NAFTA's environmentally related institutions). The fact that no such issues have reached the dispute settlement stage is arguably more a testament to the success of these rules than to their failure. If an issue becomes subject to dispute settlement, it means that all other preliminary negotiation processes have failed.

Pollution Haven

One of the prime concerns in the debate leading to the passage of NAFTA was the fear that Mexico would become a "pollution haven," that is, an area that would attract investment because of its weak environmental regulatory structure. This concern was addressed through a provision in the rules dealing with investment that states that it is "inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures." It also provides for a consultation process if one party feels as though this provision has been violated. Although there have been concerns to date that environmental laws have not been adequately addressed in each of the parties' jurisdictions (see Section IV on NAFTA's environmental side agreement), none of these allegations have been linked to an intent to attract investment. It is possible that the existence of a pollution haven provision has served to discourage governments from relaxing environmental regulations to attract investment. This provision, forward-looking and novel at the time of its drafting, has been viewed as successful and may form part of a future Multilateral Agreement on Investment (MAI) currently being negotiated at the Organization for Economic Co-operation and Development (OECD).

Dispute Resolution Provisions

NAFTA provides for a state-to-state dispute settlement process in the event that any party feels its rights under NAFTA have been violated. This process begins with consultations and, failing resolution of the issue, ends with the convening of a panel to arbitrate the issue. It provides rules that allow expert scientific evidence to be considered on any issue that may affect environmental health or safety. The provision allows the panel to be informed of, and take account of, the environmental implications of a decision.

There has been only one case since the inception of NAFTA that has resulted in the formulation of a formal dispute resolution panel. In this instance, the United States unsuccessfully challenged Canada's tariffication of its quotas under its supply-managed dairy, egg, and poultry sector. Although there were arguably environmental implications associated with this decision, as alterations in agricultural policy often do have environmental implications, such considerations did not form part of the panel's decision.

The fact that this provision has not been utilized to date, however, does not necessarily lead to the conclusion that it is, or will be, judged to be ineffectual. A review of the issues that were the subject of consultations among the parties, rather than those that reached formal dispute settlement panels, reveals a number of potential environmentally sensitive issues. These include standards concerning UHT milk, U.S. standards for reformulated gasoline regulations, meat inspections, fish conservation, and recycled content on the procurement of U.S. government paper.[8] Based on this list, "it would seem clear that Canadian and American trade negotiators deal regularly with matters that raise environmental issues."[9] This provision may become increasingly important in the ongoing resolution of trade issues within North America.

NAFTA'S ENVIRONMENTALLY-RELATED INSTITUTIONS

Several environmentally-related institutions were established in the NAFTA negotiation and ratification process. These are the various bodies that work under the Free Trade Commission, and the BECC and the NADbank, which were established through separate agreements to deal with critical and highly politically charged environmental issues on the U.S.-Mexico border.

Free Trade Commission Bodies

In order to fulfill the environmental commitments outlined in the previous section, NAFTA created a ministerial-level Free Trade Commission (FTC), supported by a network of at least 39 different committees, subcommittees, and working groups. Some of these groups have

[8] Commission for Environmental Cooperation, *Dispute Avoidance: Weighing the Values of Trade and the Environment Under the NAFTA and the NAAEC*. Environment and Trade Series 3 (Montreal, 1996).
[9] Commission for Environmental Cooperation, 1996.

specific environmentally-related mandates within the text of the NAFTA Agreement itself.[10] Others were given permissive mandates to take up environmental concerns, if necessary. A recent review of the NAFTA institutions found mixed results across the range of bodies. While virtually all of the groups with environmental mandates had begun to take action based on those mandates and have "attained concrete achievements that may have far-reaching effects," other bodies have been less effective in mobilizing environmental mandates.[11] The report further found that there were no cases where "NAFTA's economic bodies have acted on the permissive environmental mandates assigned to them by NAFTA, and in some areas their mandatory environmental responsibilities, from a political if not a legal standpoint, remain unfulfilled."[12] These groups are critical in working out the "nuts and bolts" differences in various regulations and policies that may have profound environmental implications, such as those in the transportation and agriculture sectors. They work toward harmonization and mutual recognition of standards in order to support the free flow of goods, critical to the deep economic integration process underway in North America.

Concrete environmental accomplishments include a trilateral *Emergency Response Guidebook* for accidents involving dangerous substances developed by one of the Land Transportation Standards Subcommittees in order to reduce accidents with grave environmental consequences. The same group intends to create a North American Transportation of Dangerous Goods Code for implementation in the year 2000. Another related group, the Automotive Standards Council, seeks to harmonize standards applying to automotive products. On its workplan, which has only been partially acted upon, are vehicle emissions, fuel standards, and engines.

The agriculturally related committees and working groups have been particularly active. The Technical Working Group on Pesticides was formed in direct response to concerns about the type and amount of pesticides on agricultural goods from Mexico. It is fulfilling its mandate "in a manner fully consistent with NAFTA's sustainable development goals."[13] The Committee on Sanitary and Phytosanitary Measures (SPS Committee) have met up to three times per year in an attempt to deal with policy harmonization issues and bilateral trade irritants such as the export of U.S. cherries to Mexico, the export of Mexican pork to the United States, and the export of Canadian Christmas trees to Mexico. Supporting the work of the SPS Committee are eight technical working groups that deal with a number of animal and plant health issues.

NAFTA's institutional framework is critical to the successful implementation of the commitments undertaken in NAFTA. The environmental relevance of some of these groups is indisputable, and there has been considerable progress in pursuing an environmental agenda.

[10] Commission for Environmental Cooperation, 1997.
[11] Ibid.
[12] Ibid.
[13] Ibid.

However, there remains considerable scope for some institutions, particularly those with permissive environmental mandates, to further engage in environmental concerns.

The BECC and the NADBank

Two related institutions were created at the same time as NAFTA, but established through separate agreements, to deal with critical and highly politically charged environmental issues on the U.S.-Mexico border. The Border Environment Cooperation Commission (BECC), located in Ciudad Juarez, Mexico, is charged with the development of environmental projects within 100 kilometers of the U.S.-Mexican border. It is a joint U.S.-Mexican organization that helps states, localities, and the private sector develop and find financing for environmental infrastructure projects, primarily water and solid waste initiatives. BECC's sister institution, the North American Development Bank (NADBank) is located in San Antonio, Texas, and is responsible for assistance in the funding of BECC-approved projects. The NADBank became fully capitalized in 1998, and it is now able to "leverage $225 million into $2-3 billion in lending.... and combine its financing with up to $170 million in EPA grants for eligible [projects]."[14]

To date, BECC has certified and assisted in the implementation of 16 border infrastructure projects with a combined estimated cost of almost $230 million. BECC-NADBank projects have included: the construction of a $24.8 million water treatment facility in Brawley, California; a $4.1 million project to improve the wastewater system in Mercedes, Texas; a $830,000 water supply and wastewater treatment facility in Naco, Sonora; and a number of municipal solid waste treatment facilities in Sonora.

NAFTA'S ENVIRONMENTAL SIDE AGREEMENT

Probably the most significant achievement of NAFTA, from an environmental standpoint, was the creation of the North American Agreement on Environmental Cooperation (NAAEC), which came to be known as NAFTA's environmental side agreement. Created at the urging of environmental groups in the United States, Canada, and Mexico, it is arguably the most far-reaching environmental cooperation agreement linked to an international trade agreement. This section will review the provisions of the NAAEC in order to evaluate its success.

Objectives and Obligations

The NAAEC is "like no other multilateral agreement on environment and trade. Its preamble and objectives recognize the interrelationship of the North American environment, express a commitment to the goals of sustainable development, and emphasize public

[14] Office of the Executive, *Study on the Operation and Effects of the North American Free Trade Agreement* (Washington, D.C., July 1997), p. 112.

Participation and transparency."[15] Out of the 10 objectives listed in its preamble, nine relate to environmental objectives and one to trade objectives (See *Appendix A* for a list of the 10 objectives). This reflects the degree to which the NAAEC is really an agreement about regional environmental cooperation rather than trade.

The NAAEC lists a number of obligations relating to domestic environmental law and international cooperation. They do not direct the level of environmental protection that a country is required to set, as that remains under the exclusive jurisdiction of sovereign country. In fact, many of the obligations can be best described as "soft law," because they do not create hard and binding commitments for the parties. For example, in the case of a defined obligation regarding the export of pesticides, the parties are obligated only to "consider" prohibiting the export of pesticides or other toxic substances in its territory. Some of the obligations in the NAAEC are fairly vague, such as the requirement to "promote education in environmental matters." Other obligations are more concrete, such as those requiring that parties effectively enforce their environmental laws, or those laws requiring parties to provide for just and fair access to private remedies on the part of individuals where an environmental law has been allegedly violated. The obligations under NAAEC reflect a high degree of state sovereignty with respect to the formation and implementation of domestic environmental law. At the same time, however, the NAAEC is unique in that it articulates "an interest by all Parties not only in environmental policies that may affect them through transboundary impacts, but also in what would normally be considered the purely domestic environmental issues of another state." So while many of the more pure environmental obligations are indeed soft, the procedural obligations concerning openness, transparency, and the effectiveness of existing environmental law are less so, especially when considered in the broader context of NAAEC institutional arrangements.

The Commission for Environmental Cooperation

The NAAEC created an institutional structure to implement its objectives. The Commission for Environmental Cooperation (CEC) consists of a ministerial-level Council as the governing body, a Secretariat which provides technical, administrative, and operational support, and a Joint Public Advisory Committee (JPAC). The CEC's mission statement reads,

> The CEC facilitates cooperation and public participation to foster conservation, protection, and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links between Canada, Mexico, and the United States.

The Council is the governing body of the CEC. It is composed of the three environment ministers from the three countries and meets at a minimum of once yearly. The Council is responsible for overseeing all of the activities of the Secretariat, including its budget and annual program. The "overarching responsibility of the Council is to promote and facilitate cooperation

[15] John J. Kirton and John J. Audley, "NAFTA's Commission for Environmental Cooperation: North American Performance, Hemispheric Promise," Paper prepared for the *National Wildlife Federation* (Washington, D.C., 1997), p. 1.

between the Parties through strategic selection of the Secretariat's workplan, strengthening cooperation on the development and continuing improvement of environmental laws and regulations, and expanding public access to information concerning the environment."[16]

The Secretariat is located in Montreal. It handles the day-to-day operations of the Commission and is headed by an executive director, who is chosen by the Council for a three-year term, which may be renewed once. The Secretariat's primary functions are the preparation of an annual report of the Commission's work, preparation of reports on other matters, and handling submissions on enforcement matters. It has an annual budget of $9,942,000, with equal contributions from the three members.

The JPAC is a 15-member multistakeholder advisory board responsible for advising the Council on any matter within the scope of NAAEC (see *Appendix* E). The JPAC meets annually in public session at the same time as the regular session of the Council. There are additional national advisory committees and governmental advisory committees responsible for providing advice on CEC matters.

Enforcement and Investigation of Environmental Issues

The area of the NAAEC with the highest expectations for results is the provision that allows it to investigate matters of environmental significance throughout North America. Article 13 of the NAAEC, which allows the Secretariat to cast a "roving spotlight" on environmental issues, has been used to complete two reports and initiate a third one. The first report addressed the high number of bird deaths at the Silva Reservoir in Mexico, but it concluded that Mexico was not responsible for the problem. The second report investigated the long-range transport of air pollutants throughout North America. The third report will examine migratory bird resting stops in southern Arizona.

Article 14 of the NAAEC permits individuals or environmental non-governmental organizations (ENGOs) to submit to the CEC allegations that a party to NAFTA is failing to effectively enforce its environmental law. The Secretariat then decides whether the submission meets the requisite criteria and thus merits a response from the concerned country. The Council may order that a factual record be developed. With 11 submissions to date (three against the United States, two against Mexico, and six against Canada), this has been the most widely used provision of the NAAEC (see *Appendix* D). One of the more publicized cases concerned the failure of the Government of Mexico to conduct an adequate environmental review of a project involving the construction of a cruise ship pier in Cozumel, Mexico. In this case, the Council ordered that a factual record be established, which was recently released to the public.

None of these cases have resulted in formal actions against NAFTA parties. This has led to criticisms that CEC has failed in its role as an environmental enforcer. Kirton and Audley argue that to label the process as failed would be misleading. They find an overall positive contribution because the CEC is an "institution dedicated to enhancing regulatory compliance and enforcement of environmental laws through cooperative means, rather than sanctioning

[16] Kirton and Audley, p. 2.

mechanisms." Moreover, the enforcement processes have heightened public awareness on critical environmental issues and thus served as a deterrent to potential violators.

Other Achievements

The CEC has an annual program with a number of projects in the areas of environmental conservation; the protection of human health and environment; enforcement cooperation and law; environment, trade, and economy; and information and public outreach. Work on these projects has already contributed to improved protection and enhancement of the North American environment. Some of the more notable achievements have been the development of a regional action plan aimed at reducing and eliminating the use of pesticides (chlordane and DDT) and the toxic industrial chemicals (PCB); improved environmental enforcement efforts in the tracking of illegal transborder movements of hazardous substances and wastes; the establishment of a North American Pollution Release Inventory; and the development of the first set of North American ecomaps illustrating the baseline biodiversity of ecoregions.

In 1995, the CEC established a North American Fund for Environmental Cooperation (NAFEC) in order to fund community-based projects throughout the region by engaging "the energy and imagination of the people of the region in achieving the goals and the objectives of the NAAEC." The total allocation of the NAFEC in 1996 was $1.6 million for projects with concrete results at the local level and possibly larger scale impacts. To date, 35 projects have been funded from NAFEC.

Since its inception, the CEC has been criticized for being a toothless, ineffectual organization with little potential to create any positive environmental impacts. Some groups (such as the Economic Policy Institute and Public Citizen) argue that the CEC has done little to counteract worsening environmental conditions during the four years of NAFTA's existence. However, given the mandate of the CEC, which is focused more on regime building than actual micro-environmental change, its work has arguably been a success over the past four years. It has been crucial in developing a political and institutional landscape where real, concrete environmental change can take place. It has further made more direct contributions to environmental progress through the projects it undertakes, such as the removal of certain toxins from the North American environment. Most important, however, and probably the point most neglected due to political sensitivities, through cooperation and shared technical expertise, the CEC has helped significantly in bringing Mexico up to a level of environmental protection comparable to Canada and the United States.

CONCLUSIONS ABOUT NAFTA'S ENVIRONMENTAL IMPACT

Recent reports have documented mixed results in assessing the direct environmental impact of NAFTA. Interest groups and NGOs have found that NAFTA has exacerbated health and environmental problems throughout North America. A recent report by Public Citizen found NAFTA culpable for a wide array of negative human health impacts and environmental degradation, particularly along the Mexico-U.S. border. The Economic Policy Institute in Washington, D.C. found the NAFTA architecture to be a failure and that in the post-NAFTA years there has been a substantial increase in drinking water contamination, rising ozone levels, and an increasing incidence of Hepatitis-A due to untreated sewage.

In contrast, the White House conducted a three-year review of NAFTA and found that NAFTA had an overall enhancing effect on the North American environment. Specifically, the White House report on NAFTA found that NAFTA and its related environmental agreements have effectively fostered "broad-based environmental cooperation among the three NAFTA governments" and "revitalized a long history of bilateral environmental cooperation, particularly in the case of Mexico."[17] The report found that the Mexican government is improving enforcement of its environmental laws and that the BECC and the NADBank have helped border communities design and fund environmental infrastructure projects. The Clinton Adminstration's report further concluded that the CEC has embarked on a list of "environmental projects that will have direct, positive effects on the North American environment" and has further provided "organizations and individuals of the three countries with a forum for the investigation of enforcement allegations and other environmental concerns." The overwhelming focus of the report was environmental improvements on the U.S.-Mexico border. The report tempered these findings by stating that many of the environmental problems have been the result of longstanding issues and cannot be realistically improved overnight.

The real environmental impact of NAFTA lies somewhere in between these two poles. If the question is posed in such a way as to ask what direct environmental benefits has NAFTA caused, the answer is not positive. It will be a long time before real environmental impacts emerge, and it will be difficult to link those impacts backwards exclusively to NAFTA. Even today, it is hard to argue that there are more than a handful of real and direct environmental dividends (and conversely harms) attributable to NAFTA. And to the extent that NAFTA has fostered increased trade and investment and hence production and consumption, there is arguably a coincidental growth in environmental degradation.

However, if the question is posed in such a way as to ask what impact would result if these environmental provisions were absent, the answer is clear. The impact of NAFTA has been overwhelmingly positive on the North American environment because it has developed an institutional environmental framework to grow alongside deepening regional economic integration processes. The linkages between the environment and the economy are only at the

[17] *Study on the Operation and Effects of NAFTA*, p. 111.

early evolutionary stage and will continue to deepen and grow over time. The CEC exhibits the beginnings of an international environmental regime with strong elements of public participation on issues not necessarily directly related to the economy. This has set the stage for real and concrete positive environmental change.

BIBLIOGRAPHY

Commission for Environmental Cooperation, *NAFTA's Institutions: The Environmental Potential and Performance of the NAFTA Free Trade Commission and Related Bodies*, Environment and Trade Series 5, Montreal. (1997)

Commission for Environmental Cooperation, *Dispute Avoidance: Weighing the Values of Trade and the Environment Under the NAFTA and the NAAEC*. Environment and Trade Series 3, Montreal. (1996)

Kirton, John J. and John J. Audley, "NAFTA's Commission for Environmental Cooperation: North American Performance, Hemispheric Promise," Paper prepared for the *National Wildlife Federation*, Washington, D.C. (1997).

Ludwiszewski, Raymond B. and Peter E. Seley, "Reconciling Free Trade and Environmental Protection" in Rubin, Seymour J., and Dean C. Alexander (eds.), *NAFTA and the Environment* (The Hague: Kluwer Law International, 1996).

Office of the Executive, *Study on the Operation and Effects of the North American Free Trade Agreement* (Washington, D.C. July 1997)

Rugman, Alan and Julie A. Soloway, "Corporate Strategy and NAFTA When Environmental Regulations Are Barriers to Trade," *Journal of Transnational Management Development* 3 (2), (forthcoming)

Saunders, J. O., "NAFTA and the North American Agreement on Environmental Cooperation: A New Model for International Collaboration on Trade and the Environment," *Colorado Journal of International Environmental Law and Policy* 5(2), 1994.

APPENDIX

Appendix A
NAAEC Objectives

1. Foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;
2. Promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
3. Increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna;
4. Support the environmental goals and objectives of the NAFTA;
5. Avoid creating trade distortions or new trade barriers;
6. Strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies, and practices;
7. Enhance compliance with, and enforcement of, environmental laws and regulations;
8. Promote transparency and public participation in the development of environmental laws, regulations, and policies;
9. Promote economically efficient and effective environmental measures; and
10. Promote pollution prevention policies and practices.

Appendix B
Article 13 Cases

Location	**Issue**	**Status**
Central Mexico	Death of Migratory Birds	Completed
North American region	Transboundary air pollution pathways	Completed
San Pedro River Conservation Area, Southern Arizona	Riparian area for migratory birds	Pending

Appendix C
Registry of Submissions on Enforcement Matters
Articles 14 and 15

SUBMISSION I.D. NUMBER	SUBMITTERS	DATE SUBMISSION FILED
SEM-95-001	Biodiversity Legal Foundation et al	June 30, 1995
SEM-95-002	Sierra Club et al.	August 30, 1995
SEM-96-001	Comité para la Protección de los Recursos Naturales, A.C. et al.	January 18, 1996
SEM-96-002	Mr. Aage Tottrup, P. Eng	March 20, 1996
SEM-96-003	The Friends of the Old Man River	September 9, 1996
SEM-96-004	The Southwest Center for Biological Diversity et al.	November 14, 1996
SEM-97-001	B.C. Aboriginal Fisheries Commission et al.	April 2,1997
SEM-97-002	Comité pro Limpieza del Río Magdalena	March 15, 1997
SEM-97-003	Centre québécois du droit de l'environnement (CQDE)	April 9, 1997
SEM-97-004	Canadian Environmental Defence Fund	May 26, 1997
SEM-97-005	Animal Alliance of Canada et al.	July 21, 1997

Source: CEC website <www.cec.org>